CHAI YEN v. BANK OF AMERICA NATIONAL TRUST & SAVINGS ASSOCIATION

[F.C. (Raja Azlan Shah C.J. (Malaya), Chang Min Tat & Syed Othman F.JJ.) March 4 & April 23, 1980]

[Kuala Lumpur — Federal Court Civil Appeal No. 143 of 1976]

Practice and Procedure — Appeal — Application for introduction of fresh evidence — Evidence could have been obtained at trial — Evidence irrelevant to action — Application refused.

In this case the applicant had executed two charges over her lands in favour of the respondent, to secure an overdraft account with the respondent. When demand for repayment of the sum date met with no response, the respondent commenced foreclosure proceedings against the appellant and an order for sale was made. At the appeal the appellant applied for an order for the respondent to produce before the hearing of the appeal, a continuing guarantee executed by the appellant.

Held: the application was for the introduction of fresh evidence and should be refused as (a) it was not shown that the evidence could not have been obtained with reasonable diligence for use at the trial and (b) the document in question had no relevance to the order of sale of the lands secured by the charges.

Cases referred to:-

(1) *Ladd* v. *Marshall* [1954] 1 W.L.R. 1489.

(2) *Skone* v. *Skone & Anor.* [1971] 1 W.L.R. 812.

(3) *Leng Lan* v. *S.M. Yesudian* [1939] M.L.J. 222; [1938] F.M.S.L.R. 66.

(4) *Shaik Sahied bin Abdullah Bajarie* v. *A.R.A. Mootoo Carpen Chitty* (1910) 2 M.C. 16.

(5) *Lau Foo Sun* v. *Govt. of Malaysia* [1970] 2 M.L.J. 70.

FEDERAL COURT.

G.T. Rajan for the appellant.

K. Thayalan for the respondent.

Cur. Adv. Vult.

Chang Min Tat F.J. (delivering the judgment of the Court): We refused the application of the chargor for an order to the chargee, the Bank of America National Trust and Savings Association (the Bank), to produce before the hearing of the appeal from the order of sale made by the High Court in a foreclosure action, a guarantee termed a continuing guarantee executed by the chargor. The application was said to be for the purpose of establishing the allegation that she had signed the guarantee in blank and that certain words were afterwards in fraud of her filled in by the chargee. The chargor by her counsel intimated that for this purpose she intended to submit the guarantee to a document examiner for his inspection and report and to use the report at the appeal.

At the hearing, we could not see the relevance of a guarantee in an action on a separate document, viz. the charge, nor were we at all advised how the application could be justified on well-established practice. It now behoves us to give more fully our reasons.

The applicant-chargor is the wife of one Siow Ting Yong, who was the sole proprietor of a firm known as the Valor Electrical and Electronic Co. (Valor). She is also the registered proprietress of two pieces of land, QT(R)7414 for Lot 703 in the Mukim of Petaling and C.T. 2509 for Lot 3775 in the Mukim of Bentong. On April 21, 1971, she executed a charge on Lot 703 in favour of the Bank to secure the repayment due to the Bank on the current or other accounts of Valor with the Bank. The limit of the overdraft was not specified, but doubtless it was known to the parties and would appear to be $40,000. Next on November 30, 1974, the chargor executed a second charge, this time on Lot 3775, for the same purpose. The limit of the overdraft was stated in this second charge to be $970,000 and there could be no possible doubt from the photostat copy of the charge itself and from the annexure to the charge where the figure was also spelled out in words that this sum represented the limit of the overdraft. The attestation of her execution of this second charge was by a solicitor who claimed to know her personally and who though of a different race did not require the services of an interpreter for her execution of a document which was written in the national language of the country. He was also a different solicitor from the one who attested the Bank's execution. The sole proprietor of Valor gave instructions to the Bank that the only person to operate Valor's account with the Bank was, until further notice (which was at no material time ever given), the chargor herself. The instructions were conveyed in a standard form used by the Bank and very correctly termed a mandate for a third party to operate the current account of a sole proprietorship firm. It was signed by the sole proprietor, and it bore the specimen signature of the operator.

Between the 2 charges, the chargor also executed a continuing guarantee on another standard form used by the Bank. This standard form is a printed one with spaces to be filled with the particulars relating to the guarantee. These spaces were provided for the insertion of the name and address of the guarantor, the name and address of the Bank's customer whose account was the subject matter of the guarantee and the extent of the guarantee which would in the usual way be a figure followed by the spelling out of this figure in words. This guarantee was the subject-matter of the chargor's application, production of which we disallowed.

The overdraft account of Valor stood at $896,286.79 on June 21, 1975. When demand for repayment of this sum met with no response, the Bank served notice of default dated August 21, 1975 in Form 16D. In compliance with section 254 National Land Code, the notice specified the breach which was failure to repay the whole sum due after demand and the continuation of the breach for at least one month and it required the repayment of the sum owing with the warning that failure to do so would result in an application for an order of sale.

The foreclosure summons was issued out on December 4, 1975 but much earlier, on March 22, 1975, in fact, the Bank had sued out a writ against Siew Ting Yong as the sole proprietor of Valor, for the repayment of the overdraft in his account which then stood at $897,774.71. The Bank also joined three others, the chargor, Fu Kok Siew and Yoong Fook on their guarantees, the limits of which were $970,000, $400,000 and $130,000 respectively. Irrefutable documentary evidence was produced, establishing that Fu Kok Siew was the sole proprietor of Wing Lian Enterprise and he had similarly appointed Chai Yen as the sole operator of his account with the

Bank. The record is however silent on whether Yoong Fook stood on the same footing as Siow Ting Yong and Fu Kok Siew.

It is reasonably clear that the land which is the subject matter of the second charge, being situated in Bentong in the State of Pahang, a town not of very considerable importance, is not sufficient to realise the full extent of the overdraft facilities granted under the charge and that it was for this reason that the Bank could not rely on the foreclosure summons to recover what it had lent to Valor and had to take action on the guarantees.

The defence that was delivered for Chai Yen literally "threw the book" at the Bank. She claimed that she had signed the guarantee in blank and denied any receipt of any advance of the $970,000 which consequently was not mentioned in it, and she asserted that Valor was made responsible for the money due to the Bank from the third and fourth defendants. She also charged the Bank with fraud by acting on the charges and the guarantee when it was agreed between them that the documents were not to be acted on. She made many other allegations. The truth of her allegations will of course have to be established at the trial of the action and tested against the counter allegations made by Gan Kah Chai, an assistant manager of the Bank on July 1, 1976 of "kite flying" which, as we understand it, is a commercial slang for an operation of a somewhat dubious character for raising money on credit. But this observation should be made: the chargor was said to have been given a copy of the guarantee and one would have expected her to deny this allegation or if she could not, to produce the copy given to her and show whether it was executed also in blank.

We mention this civil action partly because it was referred to in the chargor's affidavit filed to oppose the foreclosure summons and also to note and indicate that the accusation that the guarantee was signed in blank, had been made earlier and at the least, for what it is worth, bore the mark of consistency.

But though mentioned, the question of the guarantee was not taken up at the hearing of the foreclosure action and no application was made to test the authenticity of the document. The application before us was therefore one for the introduction of fresh evidence.

The principles to be applied for the reception of fresh evidence have been stated by Denning L.J. (as he then was) in *Ladd* v. *Marshall*[1] at page 1491:

"To justify the reception of fresh evidence or a new trial, three conditions must be fulfilled: first, it must be shown that the evidence could not have been obtained with reasonable diligence for use at the trial; secondly that evidence must be such that, if given, it would probably have an important influence on the result of the case, though it need not be decisive; thirdly the evidence must be such as is presumably to be believed, or in other words, it must be apparently credible though it need not be incontrovertible."

These principles as so stated have been consistently followed and have now received the approval of the House of Lords in *Skone* v. *Skone & Anor.*[2] See also *Leng Lan (f)* v. *S.M. Yesudian*[3] and *Shaik Sahied bin Abdullah Bajarie* v. *A.R.A. Mootoo Carpen Chitty*[4] at page 21.

Enough, we think, has been said to show that the applicant could not have satisfied the first requirement. Failure to satisfy this first requirement is sufficient for the dismissal of the application: *Lau Foo Sun* v. *Government of Malaysia.*[5]

As for the second, it seemed to us at the hearing of the application and still does to us now, and beyond argument that the subject matter of the civil suit was the guarantee and that of the foreclosure summons was the two charges. It follows therefore that while the allegations regarding the guarantee might be material to the civil suit, it had absolutely no relevance to the foreclosure action. That was the view of the Bank whose counsel, in our view, very correctly, indicated his entire willingness to make available the document in question at the hearing and for the purpose of the civil action but who said that he could see no connection whatsoever with the order of sale of the lands secured by the charges. In the matter of the charges, what was relevant was the ground on which the chargor challenged the granting of the order of sale and that strictly was the matter before this court on an appeal from the High Court.

In view of the High Court action on the guarantee, we must clearly refrain from commenting on its authenticity or credibility but in all the circumstances of the case, there was no merit in the application and we refused it with costs.

Application refused.

Solicitors: *G.T. Rajan & Co.; Skrine & Co.*

EAST UNION (MALAYA) SDN. BHD. v. GOVERNMENT OF STATE OF JOHORE & GOVERNMENT OF MALAYSIA

[F.C. (Suffian L.P.) April 28 & 29, 1980]

[Kuala Lumpur — Federal Court Civil Application No. 2 of 1980]

Constitutional Law — Application for leave to ask for declaration that Federal Law is ultra vires and void — Contention that Parliament has no power to enact law — Forfeiture of land for non-payment of rent — National Land Code, ss. 100 & 134 — Federal Constitution, Art. 4(4).

Land Law — Forfeiture of land for non-payment of rent — Whether s. 100 of National Land Code ultra vires and void — Federal Constitution Art. 4(4) — National Land Code, ss. 100 & 134.

In this case the applicant company did not pay quit rent for the rubber estate, of which it was the owner and the estate had been forfeited to the Johore Government. Its appeal to have the forfeiture annulled was turned down and it therefore applied for leave of a Judge of the Federal Court to ask for a declaration that section 100 of the National Land Code is void, as it is *ultra vires* Articles 76(4) of the Federal Constitution.

Held: (1) the contention in this case was that Parliament had no power to enact the impugned law and therefore as this was not an inter-governmental dispute leave is necessary before proceedings can be commenced;

(2) leave should be granted to give the applicant company the opportunity of having this matter ventilated in court.

Case referred to:-

(1) *Syarikat Banita Sdn. Bhd.* v. *Government of State of Sabah* [1977] 2 M.L.J. 217.